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No. 671

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, Deceased,
Petitioners,

vs.

FAWCETT PUBLICATIONS, a Connecticut corporation and T. D. PUBLISHING COMPANY, a New York corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

LOUIS M. MARCH
188 West Randolph Street
Suite 620
Chicago 1, Illinois
FRanklin 2-6390
Attorney for Petitioners.

The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit, which Court first on the 18th day of June, 1962, reversed the order entered by the lower court, the United States District Court for the Northern District of Illinois, Eastern Division (Honorable J. Sam Perry, District Judge). The District Court order was entered on the respondents' Motions to Dismiss the petitioners' Complaint at Law filed for damage to the personal reputation of petitioners, and for the invasion of petitioners' right of privacy. The United States Court of Appeals for the

Seventh District, first by their decision of 18th day of June, 1962, determined that petitioners' Complaint at Law set forth a good cause of action as stated against the respondents, and ordered that the District Court's order of dismissal be reversed, and petitioners' cause of action be remanded for trial. Thereafter on the respondents' petitions for rehearing filed before the United States Court of Appeals for the Seventh Circuit, the said Court on the 23rd day of August, 1962, reversed its opinion of June 18, 1962, and thereby affirmed the District Court's order of dismissal of petitioners' Complaint at Law.

Opinion Below.

The order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported, and is set forth in the Appendix hereto. The opinion of the United States Court of Appeals for the Seventh Circuit rendered on June 18, 1962, was not reported, and is printed in Appendix 1A-16A hereto. The opinion of United States Court of Appeals for the Seventh Circuit rendered on August 23, 1962, is reported in 307 Federal Court Reporter 2nd 409, and is also printed in Appendix 17A-24A hereto.

Jurisdiction.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 23, 1962, and is printed in 307 Fed. Ct. Reptr. 2nd 409. A petition for rehearing of this cause was denied by the said United States Court of Appeals on September 18, 1962. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1). This petition is timely filed.

Questions Presented.

1. Whether the petitioners' Complaint at Law filed in the District Court sets forth a good cause of action in the petitioners' against the respondents for the damages allegedly incurred by the living petitioner, Mildred Wagner, and the Estate of Mary Lou Wagner, deceased, for the allegedly unlawful printing by the respondents in their respective publications, being national detective magazines, of photographs of said Mildred Wagner, and of the body of Mary Lou Wagner; and alleges sordid, untruthful and insinuating accounts of the said Wagners, and their family reputation in connection with the murder of Mary Lou Wagner on or about November 29, 1957 in Glenview, Illinois; and which publications by the respondents were made in March and April, 1958, without the consent of Mildred Wagner, or the said estate; and which publications sought to create reader interest for their profit by the creation of fictional reports and sensationalism, and which reporting was not based on any confession of the murderer, Robert Fleig, or testimony in court; the confession obtained from Robert Fleig was never made public, was not introduced in any criminal proceeding, since at publication, no trial had been held, and which confession was in fact suppressed on the motion of said murderer's counsel at the Criminal Court hearing which commenced subsequent to said publication?

2. Do the petitioners, including the said estate, as in the instant case, maintain property rights in their respective reputations, names, and photographs of them, so that the same should not be damaged, used, and published without their express consent, and under the guise of the publication of the same by publishers claiming the right to publish same as being newsworthy, and within public interest?

3. Does the United States Constitution, particularly Section 1 of the 14th Amendment, protect an individual's property rights in his name, photograph, individual and family reputation, so that if one claims that the same has been damaged or infringed upon or published without their consent, the individual can file suit, and be given an opportunity in court and before a jury, to present the facts and circumstances, and prove that under the United States Constitution, the publishers were not permitted to publish same under the guise of fair comment and newsworthiness, and that said publications, in fact, damaged the claimants?

4. (A) Does the United States Court of Appeals for the Seventh Circuit have authority under the United States Constitution, and under Section 1 of the 14th Amendment, to predetermine without a trial on the merits of petitioners' claims against the respondents as set forth in their complaint, and render an opinion that the petitioners do not have a right to present their claims for damages to their individual reputations, under the defenses of the respondents alleged in their pleadings, and on a motion to dismiss, that the petitioners are not entitled to any damages because the publications by respondents was allegedly made under the guise of fair comment, and newsworthiness?

(B) Are the petitioners entitled to a trial by jury of the facts in order to determine whether petitioners' respective reputations have been damaged, and whether the respondents' publications were proper and permissible under the circumstances.

(C) Are the petitioners, as individuals, entitled to equal protection of the laws as guaranteed them under the Constitution of the United States.

(D) Have the petitioners received due process of law under the circumstances as guaranteed them under our Constitution.

5. Whether the test to be applied in determining whether or not printed matter is violative of the right of privacy is that of "newsworthiness" or "public interest."

The sole basis for the decision of the Court of Appeals on Aug. 22, 1962 was the fact (which fact was first presented to said Court on the respondents' petitions for rehearing) that a certain criminal trial was still pending at the time of the publications which were the subject matter of the case at bar. The Court thereby established as a test for determining whether a matter is violative of the right of privacy, that of newsworthiness. It is submitted that in setting up the exclusive test of newsworthiness, *i.e.* the time lag between the occurrence and the publication, the Court of Appeals completely disregarded the controlling Illinois decisions on this point particularly the *Annerino* case.

STATEMENT OF THE CASE.

The case at bar is an action for damages for the invasion of privacy, unauthorized publication of photos, and misrepresentation of facts, claimed by petitioners due to the publications and sale by each of the respondents in their respective national detective magazines of bizarre accounts, sensational photos relating to the murder of Mary Lou Wagner, a minor, who was fourteen (14) years of age at the time of her death on or about November 29, 1957 at the hands of a seventeen (17) year old boy named Robert Fleig in Glenview, Illinois. The petitioner, Mildred Wagner, was the mother of the said Mary Lou Wagner with whom she lived in Chicago, Illinois. The Complaint at Law filed by petitioners alleges, among other things,

that the said Robert Fleig, on or about November 29, 1957, had met Mary Lou Wagner in Chicago, Illinois, (she having known Robert Fleig prior to said date) and the said Robert Fleig offered to take her home to 1802 Farwell Avenue, Chicago, Illinois, from a certain restaurant located at or near Clark and Devon Avenues, Chicago, Illinois. That thereafter, on said date, the said Fleig contrary to his agreement to take Mary Lou Wagner home, physically forced her to go to Glenview, and remain in the car driven by him, and then and there beat and criminally assaulted her in the automobile, threw her in a ditch there, and as a direct consequence thereof, she died or or about November 29, 1957. The body of Mary Lou Wagner was discovered on or about December 3, 1957 in the ditch in Glenview, Illinois. Within a few days after the discovery of the body of Mary Lou Wagner, Robert Fleig confessed to the police, the Sheriff of Cook County, Illinois, that he had committed the crime. The written confession was never made public, presented in any court proceeding, and was not published in any newspaper or magazine. The confession of Robert Fleig was suppressed by the Court at the motion of the attorney for Robert Fleig prior to the criminal trial on the criminal charge in the Criminal Court of Cook County, Illinois, and which hearing commenced on about April 21st, 1958.

The respondent Fawcett Publications is a private corporation organized under the laws of the State of Connecticut, and in April, 1958, published and sold in Chicago, Illinois a magazine entitled "Startling Detective", and therein published a story which purported to tell the killing of Mary Lou Wagner called "Frozen Corpse in Lovers' Lane;" which appeared on page 29 of said magazine.

The complaint alleged that said story appeared without the consent of petitioners, and the story was a direct appropriation of the name, likness, and personality of petitioner Mildred Wagner, and her deceased daughter, for the pecuniary profit of said respondent, and to the damage of petitioners.

The complaint alleged respondent T. D. Publishing Corporation, in March 1958 published, distributed and/or sold a magazine entitled "True Detective" and in which a story appeared entitled "Mary Lou and the Boy Nobody Could Handle". That the story appeared without the permission of petitioners, and was a direct appropriation of the name, likeness, and personality of the petitioner Mildred Wagner, and her deceased daughter, for the pecuniary profit of said respondent, and to the damage of petitioners.

Respondent Fawcett Publications filed a Motion to Dismiss before the trial court, and set forth therein that (I) the complaint is defective as said complaint purports to set forth causes of action for libel, and that any action for libel is barred by the Illinois Statute of Limitations, (II) that respondent asks that petitioners be required to file by an order of Court a separate complaint and cause of action against this respondent because it would be prejudicial to join it with the other respondents who published articles unrelated to its article. Under the above section I of the Motion said respondent stated that the complaint is defective because (a) no right of privacy can accrue to a decedent's estate for publications made after the death of the decedent, (b) no right of action accrues to a decedent's relatives because of a publication about the circumstances, mannor or mode surrounding the decedent's death, (c) the matters and things set forth in said respondent's publication are newsworthy.

of great public interest, and designed to inform and educate respondent's readers.

Respondent T.D. Publishing Company filed a Motion to Dismiss setting forth that I. a. the estate of decedent and her relatives have no right of action for invasion of privacy, etc., b. petitioners were proper subjects of news interest and comment, etc., c. if any right of action for invasion of privacy accrued to the said estate or the other petitioner, it was barred by the Statute of Limitations of Illinois, d. that insofar as the complaint purports to set forth a cause of action of libel, it is barred by the Illinois Statute of Limitations. II. In the alternative respondent moves the Court to require the petitioners to file a separate complaint because of improper joinder, etc.

The trial Court on July 11, 1961 entered an order dismissing the petitioners complaint, a copy of which order appears in the appendix.

The petitioners filed a motion to vacate the order of dismissal, and the trial Court denied said motion.

An appeal to the United States Court of Appeals for the Seventh Circuit was timely filed by the petitioners. The said Court of Appeals on June 18, 1962 reversed the trial court's order of dismissal of petitioners' suit, and remanded the matter for trial on petitioners' complaint. This mandate appears in the appendix.

On respondents' motions for rehearing, the said Court of Appeals on Aug. 23, 1962, reversed their mandate of June 18, 1962, and dismissed petitioners complaint. The order of Aug. 23, 1962 is reported in 307 Fed. Ct. Rep. 2nd 409, and in an appendix hereto.

This petition seeks to set aside that mandate of the said Court of Appeals.

REASONS FOR GRANTING OF WRIT.

I.

Petitioners state that the Complaint At Law filed by them in the lower court sets forth a good cause of action for the violation of their rights guaranteed them under Section 1 of the 14th Amendment of the United States Constitution, which section provides that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

Whether this Honorable Court or any of the parties classify the Complaint At Law as invasion of the right of privacy or libel or other classification is not of material importance under the circumstances if the petitioners properly set forth sufficient facts in their complaint filed to present a question of fact as to whether or not their property or personal rights have been invaded or damaged by the publications published by each of the respondents in violation of petitioners' rights guaranteed them under our United States Constitution, and the 14th Amendment thereof.

In the case *Shelley* v. *Kraemer*, decided by the Supreme Court of the United States in 1948, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, the Supreme Court there stated as follows:

> "But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceeding were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed

by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in *American Federation of Labor* v. *Swing*, 312 U. S. 321 (1941), enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In *Bridges* v. *California*, 314 U. S. 252 (1941), enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment. And cf. *Chicago, Burlington and Quincy R. Co.* v. *Chicago*, 166 U. S. 226 (1897). The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the states to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."

The Supreme Court of the United States in the *Shelley* case above related, further stated as follows:

"The rights created by the first Section of the Fourteenth Amendment are, by its terms, guaranteed to the

individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of any inequalities. Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Cf. March* v. *Alabama,* 326 U.S. 501 (1946).

II.

Petitioners state that the United States Court of Appeals, 7th Circuit, should have determined by its decision that there was a proper question of fact raised by the state of the pleadings as to whether or not the petitioners' rights had been damaged or interfered with under the circumstances and facts then in existence at the time of the publications of respondents' magazine articles in March and April, 1958.

Petitioners seek to point out to this Honorable Court that a jury demand can be requested by them upon the joining of the issues in the above cause. This Court, in reviewing the articles published by the respondents, should grant petitioners the right to prove that the publications by their implications and innuendoes have damaged the personal family reputation of the mother, Mildred Wagner, that one of the articles published by re-

spondent, T. D. Publishing Corporation, (here sued as T. D. Publishing Company) and on page 80 thereof sets forth the following:

"Like many another suspect, he couldn't take it. 'I can't pass this test,' he said abruptly. 'I was with Mary Lou Wagner. I can't deny it.'

And then he began to talk. He had taken the 14-year-old girl to the country, had beaten and choked her and thrown her in a pool of water, the muscular baker's boy confessed. Nobody else was involved, he said. O'Dowd was innocent of the use to which his gray and white Ford had been put by its borrower.

The word flashed that the Mary Lou mystery had been solved. A dozen police cars gathered at the Reid laboratory. Young Fleig, in the lead car, directed the driver to a spot north of the Glenview Naval Air Station, northeast of Chicago. There, off a lonely side road, he pointed to a pool of stagnant, murky water at the bottom of a steep bank. A policeman brought a portable spotlight and directed its beam as Fleig suggested. Floating face down and surrounded by fleck of ice in the December cold, was Mary Lou Wagner's body, partly disrobed. The upper part of her childish but rounded body was (continued on page 81) nude. Her black toreador pants had been partly removed.

Robert Fleig took one look and told Detective Bilek, 'Take me away from here. Get me back to the car. I can't stand this.'

Chief Deputy Sheriff Thomas Smith, a brillant former U.S. Treasury agent, was brought into the case because the body was in his domain, in Cook County outside of Chicago proper. He, Captain Petacque, Bilker, O'Grady, Hackett and McMahon obtained Robert Fleig's written confession.

Robert said, as before, that he picked up Mary Lou at the sandwich shop. He admitted, however, that he had not taken her toward her home. Instead, he said, she consented to go for a ride into the country with him. He told of parking near the pool and starting to disrobe her.

'She didn't resist at first,' he said, 'but later she fought me and I lost my temper. We were sitting in the back of the car. I hit her with my fists and I guess maybe I choked her. She went limp. I got her out of the car and rolled her down the bank into the water. Hhe shoes came off and I threw them after her.'"

On page 81 of the above article, the writer there stated that allegedly Mary Lou Wagner consented to go for a ride in the country with Robert Fleig, that he parked near the pond, and started to disrobe her. That particular paragraph is not set forth in quotations and was not a verbatim quotation from any part of the confession of Robert Fleig. The next paragraph starting with the words, "She didn't resist at first", he said, "but later she fought me and I lost my temper. We were sitting in the back of the car . . .", seeks to relate to the reader that Mary Lou Wagner voluntarily went to the pond area with Robert Fleig, consented to disrobe and then changed her mind. The reader was not given the content of the full confession of Robert Fleig so that whatever he did say in his confession could be reviewed and analyzed by the reader. The trial of Robert Fleig did not commence until about April 23, 1958, and the confession of Robert Fleig did not become a public record.

The other detective magazine entitled "Startling Detective," published April, 1958 by defendant-appellee, Fawcett Publications, had a yellow paper runner attached to the front of the magazine with this heading: "Illinois Lovers' Lane Slaying".

On page 29 of said magazine, the title of the article involved is as follows: "Frozen Corpse in Lovers' Lane". The picture of Mary Lou Wagner and Robert Fleig appears on said page, and Mrs. Mildred Wagner is mentioned at the beginning of the article; and the address of Mary Lou Wagner as being 1802 Farwell Avenue. Page 30 has a reproduction of a picture of Mrs. Mildred Wagner, and on the same page is mentioned the following:

> "Knowing Mary Lou Wagner as he did, Detective Bilek, knew that she was not the type to skip out on her family. But she was 14 years old. Influences outside the home are sometimes stronger than those within. . . ."

On page 31 thereof, is a reproduction of a picture of Mary Lou Wagner's body in a pond, and another picture of her ripped clothing and wounds. On page 55 thereof, Mrs. Mildred Wagner is again mentioned as stating that she did not think much of Bob Fleig's story. On page 56 thereof, is mentioned the following:

> "'We talked and she asked me to drive her home,' he said. 'I had known her about two months and this wasn't the first time I had taken her home. I'd done that three times before. It was around 11 o'clock and I wasn't ready to call it a night. I knew about a spot north of Willow Road near Glenview that's used for petting parties. It's kind of a lovers' lane close to Glenview Naval Air Station. I drove there. I wanted to neck, but she didn't.
>
> Bob Fleig said he must have blown his top.
>
> 'I hit her in the face three or four times,' he confessed. 'She was screaming like anything and fighting like a tiger. I had her blouse off and she scratched me. I ripped off her slacks and underclothes. I put my arm around her neck and squeezed. I choked her.'

The husky six-footer admitted raping the helpless girl.

'Then I dressed her again and pushed her out of the car. She was still breathing, so I hit her some more. When I was sure she was dead I rolled her down the bank into the water.'"

It can be seen that from the recitation of the alleged facts concerning Robert Fleig and Mary Lou Wagner at the supposed Lovers' Lane location, that each of the writers of the articles had a different version as to whether or not Mary Lou Wagner, first, consented to going to the location with Robert Fleig, secondly, as to her wanting to neck and disrobing for Robert Fleig. The other matter in which there seems to be confusion between these two writers in the writing of their articles was whether or not Mary Lou Wagner consented to go to the back seat of the automobile or whether she was forced to go there. The matter in agreement between them is the fact that Mary Lou Wagner was murdered thereafter and Robert Fleig subsequently confessed to the murder within a short time thereafter. The definite purpose of these articles was to create excitement in the reader. These writers were not concerned with publishing the true facts, at least, as related by Robert Fleig.

The writers of the articles involved seek to create an impression to the reader that they obtained most of their information from direct sources in conversations with Mrs. Mildred Wagner, conversations with the police department, either conversations with Robert Fleig or a recitation from his confession and from other sources. Petitioner Mildred Wagner alleges in her complaint that she did not give consent or have knowledge of the publication of these articles, and suffered great personal embarrassment and damage upon their publication.

III.

The common law of Illinois permits petitioners to file their cause of action for the defamation of their character and reputation, and invasion of their right of privacy; and under the circumstances, and nature of the articles published by each of the respondents a reasonable interpretation of the same would not permit a conclusion that they were published as being newsworthy.

The factual situation in the case at bar is similar to that in *Annerino v. Dell Publishing Co.*, 17 Ill. App. 2d 205. There, the Court upheld a judgment for the plaintiff, a widow of a slain detective, and stated as follows on page 209:

> "Thus this count may be deemed to state an actionable claim on the theory that the published story was in essence not a vehicle of information but rather a devise to facilitate commercial exploitation. (Courts' own emphasis). Reading the article itself in the light of plaintiff's allegations of "exploritation" for the personal "gain and profit" of defendant this Court cannot say as a matter of law that it was solely a factual account and published for its informational value as defendant contends. The title of the article, "IF YOU LOVE ME, SLIP ME A GUN," would hardly apprise one of its alleged nature."

In the case at bar, on the cover of the April, 1958 issue of respondent's Fawcett publication, there was attached a bright yellow over-leaf upon which was printed "ILLINOIS LOVERS' LANE SLAYING" to create an effect of sensationalism. The title of the article was "FROZEN CORPSE IN LOVER'S LANE" likewise facilitating commercial exploitation rather than being a vehicle of information. In the said article, there appeared a photograph of Mary Lou Wagner's corpse which corpse was

never pictured in any Chicago newspapers at the time of the slaying. Said photograph was also utilized to facilitate commercial exploitation rather then to present informative data.

There are many state court decisions which uphold the right of a parent or spouse to recover for the invasion of his privacy in regard to a deceased child or spouse. *Bazemore* v. *Savannah Hospital,* 171 Ga. 257, 155 S.E. 194; *Douglas* v. *Stokes,* 149 Ky. 506, 149 S.W. 849; *Brents* v. *Morgan,* 221 Ky. 765, 299 S.W. 967; *Fitzsimmons* v. *Olinger Mortuary Asso.,* 91 Colo. 544, 17 P. 2d 535. *Donahue* v. *Warner Bros. Pictures, Inc.,* (C.A. 10th) 194 F. 2d 6, has held that where the invasion occurred after the death of the deceased, family members who were the only heirs may enforce the right.

CONCLUSION.

The Petition for Certiorari should be granted so that th Court of Appeals may be directed to conclude that the Petitioners have set forth a good cause of action in their complaints for their damages sustained and allegedly caused by Respondents publications; that Petitioners are entitled, to have their day in Court and to have a jury try the facts under the circumstances; and that Petitioners have rights guaranteed them under the United States Constitution, and the laws of the State of Illinois; and have rights to protection against injury to their privacy.

For the reasons stated it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

LOUIS M. MARCH,
Attorney for Petitioners.

LOUIS M. MARCH,
188 W. Randolph St.,
Chicago 1, Illinois,
FRanklin 2-6390.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13541 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, deceased,
Plaintiff-Appellant,

v.

FAWCETT PUBLICATIONS, a Connecticut corporation, and T. D. PUBLISHING COMPANY, a New York corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 18, 1962

Before SCHNACKENBERG, KNOCH and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Mildred Wagner individually and as administrator of the estate of Mary Lou Wagner, deceased, by her appeal to this court challenges the district court's dismissal of her complaint against Fawcett Publications, a Connecticut corporation, and T. D. Publishing Company,[1] a New York corporation, defendants, on the ground that the cause of action set forth therein was barred by the statute of limitations.[2]

[1] While this defendant asserts its correct name is "T D Publishing Corporation", no point is made as to the designation used in this case.

[2] In its order the court observed that in view of such dismissal on the basis of the bar of limitations, it was unnecessary to reach the other grounds urged for dismissal.

Plaintiff's complaint purported to set forth a cause of action for invasion of privacy in the publishing by each defendant, in magazines published in March and April 1958, of "stories" purporting to tell of the killing of said Mary Lou Wagner, daughter of plaintiff, and that each publication, being without the permission of plaintiff, was a direct appropriation of the name, likeness and personality of plaintiff Mildred Wagner and her deceased daughter, for the pecuniary profit of said defendants and to the detriment of plaintiffs.

Defendant Fawcett filed a motion to dismiss the complaint, insofar as it "purports to set forth a cause or causes of action for libel," it appearing from the complaint that "any action for libel is barred by the Illinois Statute of Limitations," and also because the complaint was fatally defective for the reason *inter alia* that "the matters and things set forth in the defendant's publication are newsworthy, of great public interest, and designed to inform and educate defendant's readers."[3]

It appears that, while T. D. Publishing Company's motion to dismiss included, as one ground, an assertion that the Illinois Statute of Limitations barred plaintiff's action for invasion of right of privacy, its further research indicated that this action was not so barred, and that ground of objection was therefore withdrawn. The record does not show that this withdrawal was ever repudiated in the district court. This defendant also set forth in its motion that the articles related to matters of news interest and comment, which were newsworthy and of public interest.

By her briefs in the district court, plaintiff disclaimed any action for libel against either defendant.

1. Fawcett's motion to dismiss clearly recognized the distinction between a cause of action for libel and a cause of action for violation of the right of privacy. Its motion set up the defense of the statute of limitations to a libel action but not to an action for invasion of the

[3] Said motion was also to dismiss the complaint as to the estate of Mary Lou Wagner or Mildred Wagner individually, for the reason that no right of privacy action can accrue to a decedent's estate or relatives for publications made after the death, or about the circumstances surrounding the death.

right of privacy. It filed no answer, although 28 U.S.C.A. Rule 8 (c) provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations, * * *.

This record reveals, therefore, that Fawcett did not raise in any manner authorized by law the defense of the statute of limitations to the plaintiff's right of privacy action. Instead, by its motion to dismiss, it attacked the complaint on its merits, thus waiving the affirmative defense of the statute of limitations to the right of privacy action. It can find no solace in citing *Anderson* v. *Linton*, 178 F.2d 304, 310, where, *inter alia*, we were considering the provisions of the wrongful Death Act of Illinois, which did not involve an application of any statute of limitations. That case involved the time limitation for bringing suit contained in the Wrongful Death Act, universally recognized as a condition precedent, which is quite a different thing.

However, our attention has been called to the fact that in the case at bar the district court on its own motion incorporated in its final order, "it appearing from the face of the complaint that the cause of action set forth therein is barred by the statute of limitations", and dismissed the complaint, expressly stating that it was not necessary to review *the other grounds* urged by defendants for dismissal.

The raising of the defense of the statute of limitations is a personal privilege of a defendant. If it fails to take advantage of that privilege in the manner provided by law, it is waived. It was no concern of the district court and that court has no right to apply the statute of limitations *sua sponte*.[4]

---

[4] We appreciate the good intention of the trial judge in the action which he took. He explained, when he denied a motion to vacate the dismissal order, that "this is the kind of case that if there is a statute of limitations, we would spend two or three weeks or a month trying the case and then have the Court of Appeals say the statute of limitations controls, we had better have it out of the way now than to have a trial which would be costly to you and to the other people, and then have it out of the way."

2. We are required to determine whether the complaint states a cause of action for an invasion of the privacy of plaintiff Mildred Wagner, whose daughter Mary Lou Wagner, was, according to the articles allegedly published by defendants, murdered in November 1957. Parenthetically, we hold that no cause of action was vested in her as administrator of her daughter's estate.

The following summary of facts is taken from the complaint.

According to count I, in that month Mary, a high school student in Chicago, was beaten and assaulted in an automobile in possession of Robert Max Fleig, as a result of which she died and her body was discovered near Glenview, Illinois, about December 3, 1957.

In the April 1958 issue of "Startling Detective" published by Fawcett, a story appeared purporting to relate the girl's killing, under the title "FROZEN CORPSE IN LOVERS' LANE".

In the March 1958 issue of "True Detective", published by T. D. Publishing Company, a story appeared purporting to relate the aforesaid killing, under the title "MARY LOU AND THE BOY NOBODY COULD HANDLE."

These publications were without the permission of plaintiff, and were alleged to be a direct appropriation of the names, likenesses and personalities of plaintiff and her deceased daughter, for the pecuniary profit of said defendants and to the detriment of plaintiff, for which alleged wrongful appropriation and conversion the complaint claimed damages.

According to count II, the stories were replete with photographs which delved into the personal and private life of plaintiff without her consent, and defendants "used plaintiffs' personal and private life for their corporate and private pecuniary gain by creating a sensation of the private and personal life of plaintiff by means of publishing, distributing and selling * * * magazines, copies of which are attached, * * * which purport to account for the happenings of plaintiff and her deceased daughter, and appropriated same to their own corporate use for their own corporate profit and personal gain, and in so

doing invaded plaintiffs' right of privacy;" that said photographs of Mary, which were given to Chicago newspapers for the sole purpose of finding her, were, after the finding of her body, without the consent or authority of plaintiff, reproduced by defendants in said magazines; that by reason of the foregoing plaintiff has suffered great mental pain and anguish by said publications and the invasion of her right of privacy in a time of deep personal sorrow and thereafter.

In counts III and IV, it is set forth that defendants Fawcett and T. D. Publishing Company, each published in said articles a photograph of Mary procured without the consent of plaintiff.

In count IV it is alleged that the aforesaid unauthorized publications caused plaintiff to lose her standing in the community, and great mental pain and anguish, caused by the impression that plaintiff sold said stories to defendants for personal profit out of her daughter's tragic misfortune.

Appended hereto, we have reproduced salient parts of the publications in question. First shown are excerpts from Fawcett's publication, and the remaining are from T. D. Publishing Company's publication.

Fawcett

FROZEN CORPSE IN LOVERS' LANE

The watery grave for the teen-ager turned to ice and proved a trap for the lust bludgeoner

Thin ice has formed over Mary Lou's corpse at right which li
After pulling body ashore, officers at left examine the vict

ch lies face downward in a small pond.
victim's ripped clothing and wounds.

Speaking of Fleig, the Fawcett article stated:

"The youth went on to tell how he had met Mary Lou Wagner there.

"'We talked and she asked me to drive her home,' he said. 'I had known her about two months and this wasn't the first time I had taken her home. I'd done that three times before. It was around 11 o'clock and I wasn't ready to call it a night. I knew about a spot north of Willow Road near Glenview that's used for petting parties. It's kind of a lovers' lane close to Glenview Naval Air Station. I drove there. I wanted to neck, but she didn't.'

"Bob Fleig said he must have blown his top.

"'I hit her in the face three or four times,' he confessed. 'She was screaming like anything and fighting like a tiger. I had her blouse off and she scratched me. I ripped off her slacks and underclothes. I put my arm around her neck and squeezed. I choked her.'

"The husky, six-footer admitted raping the helpless girl.

"'Then I dressed her again and pushed her out of the car. She was still breathing, so I hit her some more. When I was sure she was dead I rolled her down the bank into the water.'"

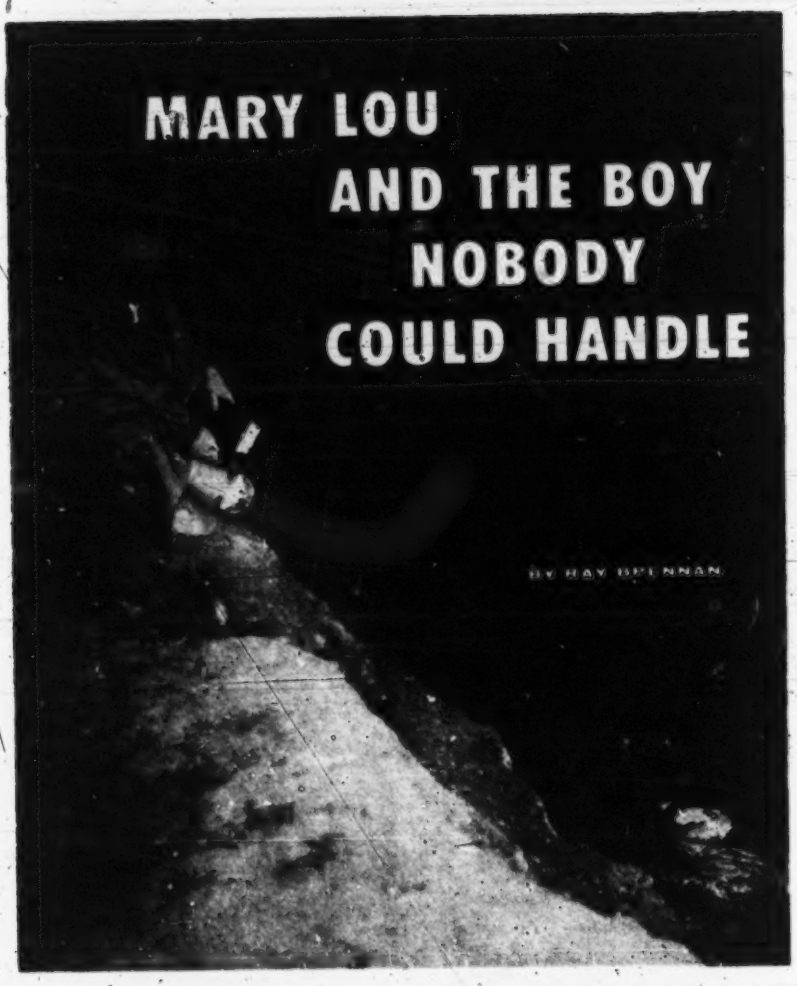
* * *

"Detectives who searched the car Bob Fleig borrowed found a button from a girl's dress that Mrs. Wagner identified as belonging to her daughter."

T. D. Publishing Company

MARY LOU AND THE BOY NOBODY COULD HANDLE

BY RAY BRENNAN



Following the confessed killer's directions, the murdered girl's body was found in a pool of murky water beneath a steep bank

Victim's sister and slayer's father attempted to console heartbroken mother at the official inquest

Speaking of Fleig, the T. D. article said:

> "Robert said, as before, that he picked up Mary Lou at the sandwich shop. He admitted however, that he had not taken her toward her home. Instead, he said, she consented to go for a ride into the country with him. He told of parking near the pool and starting to disrobe her.
>
> "'She didn't resist at first,' he said, 'but later she fought me and I lost my temper. We were sitting in the back of the car. I hit her with my fists and I guess maybe I choked her. She went limp. I got her out of the car and rolled her down the bank into the water. Her shoes came off and I threw them after her.'
>
> "He found a pink coin purse in his pocket and later tossed it into the gutter where it was recovered. Robert said. 'So far as I know,' he added, 'she was still alive when I drove away and left her in the water.'
>
> "But Dr. Irving J. Levine, after an autopsy, disagreed with Robert Fleig's story of how the murder was committed. The girl's skull had been terribly crushed by repeated blows with a heavy weapon. • • •"

Our decision is controlled by the law of Illinois. In *Eick* v. *Perk Dog Food Co.*, 347 Ill. App. 293 (1952), it was recognized that the preponderance of authorities supports the view that there is a legal right of privacy, the invasion of which gives a right to a cause of action.

More recently, in *Annerino* v. *Dell Publishing Co.*, 17 Ill. App. 2d 205 (1958), the court recognized again that a publisher of a magazine is required to answer a complaint charging an invasion of plaintiff's right of privacy. In that case the defendant was charged with publishing an article entitled "If You Love Me, Slip Me a Gun", using in connection therewith a photograph of plaintiff, whose husband, a city detective was fatally wounded by a gunshot which occurred when his partner was wrestling with a person who had escaped custody. The court, at 208, in reliance on *Eick*, said that it was the intention to protect the individual from more than use for advertising or trade purposes. Defendant there argued that the article in question was a factual account of the escape of a dangerous criminal and therefore the use of plaintiff's photograph was not actionable and the nature of the event portrayed was evidence of its newsworthy value. While recognizing a proper exercise of the freedom of the press, Mr. Justice Lewe, at 209, said:

"• • • However, this rule is not a license by which various press media may overstep the bounds of propriety and decency and thereby justify an invasion of the solitude of the individual. • • •".

At 210, the judge added:

"• • • Plaintiff here has made the publication an essential allegation of her complaint. • • • There is no difficulty in ascertaining that what plaintiff complains of is not news reporting, but the use of her photograph in connection with a 'story' which makes a strong appeal to the idle and prurient. This is sufficient to raise a question of fact."

Annerino has been recognized as a very proper enlargement of the principle laid down in the *Eick* case. *Bradley* v. *Cowles Magazines, Inc.*, 26 Ill. App. 2d 331, 334 (1960).

Both defendants rely on our holding in *Rozhon* v. *Triangle Publications, Inc.*, 230 F.2d 359 (1956). However, the peculiar facts in that case distinguish it from the case at bar. Moreover, we must look to the law of Illinois as announced in *Annerino* and recognized in *Bradley* which were decided since *Rozhon*.

Addressing ourselves to Fawcett's attack upon the complaint on the ground that matters set forth in its publication were newsworthy, of great public interest, and designed to inform and educate its readers, we are of the opinion that the trier of facts could find the articles in question, published months after the death of Mary Lou Wagner, had ceased to be news and for that reason these articles were not published in news media, but in magazines sold for the entertainment of their readers. By our holding we in no way suppress the legitimate publication of news; rather we condemn the pursuit for commercial purposes of those who may have been connected with matters which were, at the time of the occurrence, newsworthy. When the news media have served their proper function in reporting current events, private individuals involved therein sink back into the solitude which is the right of every person. That solitude involves a privacy which no publication has a right to thereafter invade solely for the purpose of selling to its readers lurid accounts of tragedy.

e reasons, we hold that the district court erred
ler dismissing the complaint herein is reversed
cause remanded for further proceedings not
t with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

[illegible] of father of accused, Miss Harper [illegible] his Mitchell hospital [illegible] hands of Mrs. Mildred Wagner, [illegible] of the young victim.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, June 18, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Wm. G. Knoch, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, deceased,
Plaintiff-Appellant;
No. 13541 *vs.*
FAWCETT PUBLICATIONS, a Connecticut corporation, and T. D. PUBLISHING COMPANY, a New York corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Wednesday, August 22, 1962

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

MILDRED WAGNER, individually, etc.,
Plaintiff-Appellant;
No. 13541 *vs.*
FAWCETT PUBLICATIONS, *et al.;*
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the petitions of Fawcett Publications and T. D. Publishing Company, defendants-appellees herein, for rehearing en banc be, and the same are hereby DENIED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Wednesday, August 22, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

MILDRED WAGNER, individually, etc.,
Plaintiff-Appellant,
vs.
FAWCETT PUBLICATIONS, *et al.*,
Defendants-Appellees.

No. 13541

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the petitions of Fawcett Publications and T. D. Publishing Company, defendants-appellees herein, for a rehearing be, and the same are hereby GRANTED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13541 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, deceased,
Plaintiff-Appellant,
vs.
FAWCETT PUBLICATIONS, a Connecticut corporation, and T. D. PUBLISHING COMPANY, a New York corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION ON REHEARING

August 23, 1962

Before SCHNACKENBERG, KNOCH and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Mildred Wagner, individually and as administrator of the estate of Mary Lou Wagner, deceased, by her appeal to this court challenges the district court's dismissal of her complaint against Fawcett Publications, a Connecticut corporation, and T. D. Publishing Company,[1] a New York corporation, defendants, on the sole ground that the cause of action set forth therein was barred by the Illinois statute of limitations.

Plaintiff's complaint purported to set forth a cause of action for invasion of privacy in the publishing by each defendant, in magazines published in March and April

[1] While this defendant asserts its correct name is "T D Publishing Corporation", no point is made as to the designation used in this case.

1958, of "stories" purporting to tell of the killing of said Mary Lou Wagner, daughter of plaintiff, and that each publication, being without the permission of plaintiff, was a direct appropriation of her name, likeness and personality and that of her deceased daughter, for the pecuniary profit of said defendants and to the detriment of plaintiff.

On June 18, 1962 our opinion on the appeal of plaintiff was filed. Fawcett and T. D. Publishing Company filed petitions for rehearing.

1. For the reasons herein stated we have granted a rehearing. Our prior opinion is withdrawn. It was responsive to defendants' contentions which were summarized by Fawcett's original brief in these words:

> "* * * Any person involved in a *newsworthy event* loses his privacy and may not complain concerning a report of his involvement in the event. Mrs. Wagner is precisely within the ambit of this rule; her daughter's murder was a most *newsworthy occurrence* and the publishing of the *mother's participation in the event is a report of the news.*"[2] (Italics supplied)

Similarly this contention was expressed by T. D. Publishing Company, the other defendant, in a motion to dismiss. It there stated that the complaint failed to state a claim on which relief could be granted because "Mary Lou Wagner and plaintiff were proper subjects of news interest and comment and the material in this defendant's publication is news worthy and of public interest". These statements of defendants' contentions bring into clear focus the factual situation to which our opinion was properly limited. We held that the trier of facts could find that the articles published by defendants months after the death of Mary Lou Wagner had ceased to be news. We expressly disclaimed any intention to suppress the legitimate publication of news.

The facts presented to us at that time tended to prove that the death of Mary Lou Wagner had ceased to be news when the articles were published. However, following the release of our opinion, we permitted Field Enterprises, Inc. to file a brief as amicus curiae in which it in effect challenged defendants' test of newsworthiness, al-

[2] This contention was also set forth in Fawcett's motion to dismiss, post 4.

though the amicus curiae admitted that "this infant area of the law must be built step by painful step". The amicus curiae would substitute as a test whether a publication is of public interest, rather than whether it is newsworthy.

For the purpose of decision we felt constrained to apply the test embodied in the contentions made by defendants, parties to this appeal. Obviously that test varies from the contention now advanced by the amicus curiae.

The word "news" is in common usage and means a report of a recent event; fresh tidings; recent intelligence. Webster's New International Dictionary (2d Ed., 1961).

In accordance with its theory that news was involved, Fawcett, in its petition for rehearing for the first time asked this court to take judicial notice of certain proceedings in the Criminal Court of Cook County, Illinois case number 57-3193 People v. Robert Max Fleig, referred to in defendants' publications as the suspected killer of Mary Lou Wagner, from which it appears that on April 21, 1958 the case was heard and plaintiff was named as a witness.

Plaintiff's answer does not deny that these court proceedings took place. We take judicial notice of those proceedings. *St. Paul F. & M. Ins. Co.* v. *Cunningham*, 9 Cir., 257 F. 2d 731 (1958).

On rehearing these facts have emerged, which were not relied upon in the original briefs, and which belatedly establish that when the articles in question were published by defendants their subject matter related to current news. For that reason, under Illinois law (which controls our decision) as announced in *Eick* v. *Perk Dog Food Co.*, 347 Ill. App. 293 (1952),[3] *Annerino* v. *Dell Publishing Co.*, 17 Ill. App. 2d 205 (1958), *Bradley* v. *Cowles Magazines, Inc.*, 26 Ill. App. 2d 331 (1960), and *Rozhon* v. *Triangle Publications, Inc.*, 230 F. 2d 359 (1956), the district court did not err in dismissing plaintiff's complaint, even though it based its action on the Illinois law of limitations, to which we are about to refer.

2. Defendant Fawcett filed a motion to dismiss the complaint, insofar as it "purports to set forth a cause or

[3] In Eick, it was recognized that the preponderance of authorities supports the view that there is a legal right of privacy, the invasion of which gives a right to a cause of action.

causes of action for libel," it appearing from the complaint that "any action for libel is barred by the Illinois Statute of Limitations," and also because the complaint was fatally defective for the reason *inter alia* that "the matters and things set forth in this defendant's publication are newsworthy, of great public interest, and designed to inform and educate defendant's readers."[4]

It appears that, while T. D. Publishing Company's motion to dismiss included, as one ground, an assertion that the Illinois Statute of Limitations barred plaintiff's action for invasion of right of privacy, its further research indicated that this action was not so barred, and that ground of objection was therefore withdrawn. The record does not show that this withdrawal was ever repudiated in the district court. This defendant also set forth in its motion that the articles related to matters of news interest and comment, which were newsworthy and of public interest.

By her briefs in the district court, plaintiff disclaimed any action for libel against either defendant.

Fawcett's motion to dismiss clearly recognized the distinction between a cause of action for libel and a cause of action for violation of the right of privacy. Its motion set up the defense of the statute of limitations to a libel action, citing § 14, ch. 83, Ill. Rev. Stat., but not to an action for invasion of the right of privacy. It filed no answer, although 28 U. S. C. A. Rule 8(c) provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations, * * *.

This record reveals, therefore, that Fawcett did not raise in any manner authorized by law the defense of the statute of limitations to the plaintiff's right of privacy action. Instead, by its motion to dismiss, it attacked the complaint on the merits, thus waiving the affirmative defense of the statute of limitations to the right of privacy action. It can find no solace in citing *Anderson* v. *Linton*, 178 F. 2d

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[4] Said motion was also to dismiss the complaint as to the estate of Mary Lou Wagner or Mildred Wagner individually for the reason that no right of privacy action can accrue to a decedent's estate or relatives for publication made after the death, or about circumstances surrounding the death.

In view of our deposition of this appeal it is unnecessary to pass upon this question raised by the motion.

304, 310, where, *inter alia*, we were considering the provisions of the Wrongful Death Act of Illinois, which did not involve an application of any statute of limitations. That case involved the time limitation for bringing suit contained in the Wrongful Death Act, universally recognized as a condition precedent; which is quite a different thing. *Wilson* v. *Tromly*, 404 Ill. 307 (1949), *Fitzpatrick* v. *Pitcairn*, 371 Ill. 203 (1939), *Metropolitan Trust Co.* v. *Bowman Dairy Co.*, 369 Ill. 282 (1938), *Lowrey* v. *Malkowski*, 20 Ill. 2d 280, 283 (1960). In *Metropolitan Trust*, *supra*, at 227, the court said:

> "* * * Some former decisions of this court have inadvertently used the words, 'Statute of Limitations' in applying the one-year limitation for commencing suit under the Injuries act, but the holding, in each case, was an application of the latter statute, and it was not meant to designate it as a statute of limitations. * * *"

Our attention has been called to the fact that in the case at bar the district court on its own motion incorporated in its final order, "it appearing from the face of the complaint that the cause of action set forth therein is barred by the statute of limitations", and dismissed the complaint, expressly stating that it was not necessary to review *the other grounds* urged by the defendants for dismissal.

The raising of the defense of the statute of limitations, as opposed to the time limitations in the Wrongful Death Act, is a personal privilege of a defendant. If it fails to take advantage of that privilege in the manner provided by law, it is waived. It was no concern of the district court and that court had no right to apply the statute of limitations *sua sponte*.[5]

For the reasons herein stated, we hold that the district court did not err in dismissing the complaint and its judgment will be affirmed.

JUDGMENT AFFIRMED.

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[5] We appreciate the good intention of the trial judge in the action which he took. He explained, when he denied a motion to vacate the dismissal order, that "this is the kind of case that if there is a statute of limitations, we would spend two or three weeks or a month trying the case and then have the Court of Appeals say the statute of limitations controls, we had better have it out of the way now than to have a trial which would be costly to you and to the other people, and then have it out of the way."

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, August 23, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

MILDRED WAGNER, individually and as Administrator of the Estate of MARY LOU WAGNER, deceased,
Plaintiff-Appellant,
No. 13541 *vs.*
FAWCETT PUBLICATIONS, a Connecticut corporation, and T. D. PUBLISHING COMPANY, a New York corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(On Rehearing)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel, and the opinion of this Court was filed and judgment entered on June 18, 1962, which opinion and judgment are hereby ordered withdrawn.

IT IS ORDERED and adjudged by this Court that the order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court on rehearing filed this day.

(Sep 27 1962)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, September 18, 1962

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

MILDRED WAGNER, individually, etc.,
Plaintiff-Appellant,

No. 13541 *vs.*

FAWCETT PUBLICATIONS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the petition for rehearing en banc filed by plaintiffs-appellants in the above entitled appeal be, and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, September 18, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

MILDRED WAGNER, individually, etc., *Plaintiff-Appellant,*

No. 13541 *vs.*

FAWCETT PUBLICATIONS, *et al.*, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED by the Court that the petition for rehearing filed by plaintiffs-appellants in the above entitled appeal be, and the same is hereby DENIED.

The United States District Court for the Northern District of Illinois, Eastern Division, Honorable J. Sam Perry, Judge on July 11, 1961, entered the following order:

> ". . . and it appearing from the face of the complaint that the cause of action set forth therein is barred by the statute of limitations it is further ordered that the motion to dismiss the complaint herein made by defendant Fawcett Publications and the motion to dismiss the complaint herein made by the defendant T.D. Publishing Co. be and each such motion is hereby granted on the ground that the cause of action set forth in the complaint is barred by the statute of limitations. The court observed that in view of such dismissal on the basis of the bar of limitations it is unnecessary to reach the other grounds urged by said defendants for dismissal."

Office Supreme Court, U.S.
FILED
JAN 5 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 671

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, deceased,

Petitioners,

vs.

FAWCETT PUBLICATIONS, a Connecticut corporation, and T. D. PUBLISHING COMPANY, a New York corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD ELLIS,
DON H. REUBEN,
JOHN E. ANGLE,
130 East Randolph Drive,
Chicago 1, Illinois,
THOMAS A. DISKIN,
420 Lexington Avenue,
New York 17, New York,
Attorneys for Defendant-Appellee Fawcett Publications.

Of Counsel:
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS,
130 East Randolph Drive,
Chicago 1, Illinois,
DEWITT, NAST & DISKIN,
420 Lexington Avenue,
New York 17, New York.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 671

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, deceased,

Petitioners,

vs.

FAWCETT PUBLICATIONS, a Connecticut corporation and T. D. PUBLISHING COMPANY, a New York corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MAY IT PLEASE THE COURT:

The Petition for Certiorari states no basis for review by this court.

The first and now withdrawn opinion rendered by the Seventh Circuit clearly violated established constitutional guarantees of free speech and press. *Winters* v. *New York*, 333 U. S. 507; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495. The affirmance of the District Court after the rehearing is constitutionally correct and is a result dictated by both the law of Illinois [*Bradley* v. *Coules Magazines, Inc.*, 26 Ill. App. 2d 331, 168 N. E. 2d 64; *Buziński* v. *Do-All Co.*, 31 Ill. App. 2d 191, 175 N. E. 2d 577; *Rozhon* v. *Triangle Productions*, 230 F. 2d 359 (7th Cir.)] and the de-

cided cases generally.[1] The order dismissing this case should thus not be disturbed whether the First Amendment, the Illinois law, or the authorities generally be consulted.

We respectfully request the Petition for Certiorari be denied.

Respectfully submitted.

HOWARD ELLIS,
DON H. REUBEN,
JOHN E. ANGLE,
130 East Randolph Drive,
Chicago 1, Illinois,

THOMAS A. DISKIN,
420 Lexington Avenue,
New York 17, New York,
Attorneys for Defendant-Appellee Fawcett Publications.

Of Counsel:

KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS,
130 East Randolph Drive,
Chicago 1, Illinois,

DEWITT, NAST & DISKIN,
420 Lexington Avenue,
New York 17, New York.

January 3, 1963.

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[1] *Sidis* v. *F-R Publishing Co.*, 113 F. 2d 806 (2nd Cir.), *cert. den.* 311 U. S. 711; *Jenkins* v. *Dell Publishing Co.*, 251 F. 2d 447 (3rd Cir.), *cert. den.* 357 U. S. 921; *Estill* v. *Hearst Publishing Co.*, 186 F. 2d 1017 (7th Cir.); *Leverton* v. *Curtis Publishing Co.*, 192 F. 2d 974 (3rd Cir.); *Werner* v. *Hearst Publishing Co.*, 297 F. 2d 145 (9th Cir.); *Elmhurst* v. *Pearson*, 153 F. 2d 467 (D. C. Cir.); *Bernstein* v. *National Broadcasting Co.*, 129 F. Supp. 817 (D. D. C.), *aff'd on trial court's opinion* 232 F. 2d 369 (D. C. Cir.), *cert. den.* 352 U. S. 945; *Hazlitt* v. *Fawcett Publications, Inc.*, 116 F. Supp. 538 (D. Conn.); *Miller* v. *National Broadcasting Co.*, 157 F. Supp. 240 (D. Del.); *Frith* v. *Associated Press*, 176 F. Supp. 671 (D. S. C.); *Berg* v. *Minneapolis Star and Tribune Co.*, 79 F. Supp. 957 (D. Minn.); *Smith* v. *Doss*, 251 Ala. 250, 37 S. 2d 118; *Carlisle* v. *Fawcett Publications, Inc.*, 20 Cal. Rptr. 405; *Smith* v. *National Broadcasting Co., Inc.*, 138 Cal. App. 2d 807, 292 P. 2d 600; *Stryker* v. *Republic Pictures Corporation*, 108 Cal. App. 2d 191, 238 P. 2d 670; *Goelet* v. *Confidential*, 5 App. Div. 2d 226, 171 N. Y. S. 2d 223; *Molony* v. *Boy Comics Publishers, Inc.*, 277 App. Div. 166, 98 N. Y. S. 2d 119.

Office Supreme Court, U.S
FILED
JAN 12 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 671

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, deceased,

Petitioners,

vs.

FAWCETT PUBLICATIONS, a Connecticut corporation and T. D. PUBLISHING COMPANY, a New York corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DAVID B. BARTELL,
60 East 42nd Street,
New York 17, New York,

LEE B. BARTELL,
7th and Ash,
San Diego, California,
Attorneys for Defendant-Appellee T. D. Publishing Company.

Of Counsel:
BARTELL & PANAGIS,
3500 N. Sherman Blvd.,
Milwaukee 16, Wisconsin.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 671.

MILDRED WAGNER, individually and as administrator of the Estate of MARY LOU WAGNER, deceased,

Petitioners,

vs.

FAWCETT PUBLICATIONS, a Connecticut corporation and T. D. PUBLISHING COMPANY, a New York corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition presents no basis which warrants a review by this Court. There is no federal question involved.

The order of the lower court in dismissing the petitioners' complaint is consistent with the applicable laws of Illinois as decided by the Illinois courts. *Bradley* v. *Cowles Magazines, Inc.*, 26 Ill. App. 2d 337, 168 N. E. 2d 64; *Buzinski* v.

Do-All Co., 31 Ill. App. 2d 191, 175 N. E. 2d 577; *Rozhon* v. *Triangle Productions*, 230 F. 2d 359 (7th Cir.).

We concur with the position taken by respondents Fawcett as presented in their brief to this Court.

It is respectfully requested that the Petition for Certiorari be denied.

Respectfully submitted,

DAVID B. BARTELL,
60 East 42nd Street,
New York 17, New York,

LEE B. BARTELL,
7th and Ash,
San Diego, California,
Attorneys for Defendant-Appellee
T. D. Publishing Company.

Of Counsel:
BARTELL & PANAGIS,
[illegible]00 N. Sherman Blvd.,
Milwaukee 16, Wisconsin.